
LEE AH CHOR

v.

SOUTHERN BANK BHD.

SUPREME COURT, KUALA LUMPUR

ABDUL HAMID OMAR LP

GUNN CHIT TUAN SCJ

MOHD. JEMURI SERJAN SCJ

[CIVIL APPEAL NO. 02-62-90]

10 DECEMBER 1990

CONTRACT: *Two guarantees - Whether later one substitution of first - Failure to specify interest rate in guarantee - Non-compliance with procedure for service of notice of demand - Construction of guarantee - Read together with letter of offer.*

CIVIL PROCEDURE: *Issues raised at appellate stage not pleaded - Vital issues - Necessity for strict compliance with rules of pleadings - Whether can be raised at appeal.*

On 6 January 1982, the respondent bank SBB, granted an overdraft facility of RM700,000 to company S; as security for the facility, 8 parcels of properties were charged and a continuing guarantee for RM700,000 (the first guarantee) was given by the board of directors of S, of which the appellant L was a member. On 13 January 1984, SBB's solicitor demanded a sum which was in excess of the overdraft. As a result of failure to pay, SBB commenced proceedings against all the guarantors. Another guarantee was executed by a new board of directors of S, excluding L and two other directors on 19 September 1983 (the second guarantee); this was a continuing guarantee to cover the overdraft plus two term loans for a limit of RM900,000 (comprising the approved term loans of RM200,000 and RM90,000 and overdraft of RM700,000); no monies were released under the second guarantee.

L claimed that any liability of his, if any, in relation to the first guarantee had been discharged by the substitution of the second guarantee which he had not executed. In addition, it was contended that the failure to specify the rate of interest by leaving it blank in the first guarantee renders it void for uncertainty. Finally, L submitted that as the notice of demand was given by SBB's solicitor M and not by one of SBB's officers as provided under Clause 11 of the first guarantee in relation to the method of making a demand, the notice was nugatory.

The trial Judge held that the blanks in the first guarantee in respect of the rate of interest did not invalidate that guarantee because the rate of interest had been stated in the offer letter and none of the guarantors including the appellant ever raised objections or queried the interest when the monthly statements of accounts were sent to them. The trial Judge however did not deal with the issue of whether the second guarantee was a substitution of the first and whether L's liability was discharged under the first guarantee. However, he held that it was of no consequence that the second guarantee was entered into as the action before him was not in respect of the first guarantee but of the second guarantee.

As for the submission that the second guarantee was entered into because of the defects in the first guarantee the learned Judge held that the second guarantee was not necessary because no further sums of money was released under the second guarantee; hence this appeal. It was clear from the record of appeal that the issues in relation to whether a proper demand had been made and the failure to specify the rate of interest in the first guarantee which were canvassed before the Court was never pleaded at all at the trial nor was any evidence led or adduced on these issues - neither were there any attempts made to have the amended statement of defence further amended.

- a* This raises the question whether such vital issues affecting the result of the appellant's case need not be pleaded at the outset but could decisively be determined after cross-examinations of witnesses for the plaintiff and submission by Counsel for the defendant at the trial.

Held:

- b* [1] (a) Pleadings in a civil suit are very important and it is a question of whether Counsels, either because of negligence or inadvertence, choose to pay them scant or no heed at all and they do so at their peril;
- (b) lapses in the strict compliance with the rules of pleadings should not be tolerated at the expense of the clients;
- (c) where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal - the Court will not hear Counsel for the appellant's submission on these issues and therefore the appeal in respect of these issues was dismissed.
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[2] Notwithstanding the dismissal of the appellant's claim on the issues in (1) above:

- d* (a) clause 11 of the first guarantee is a discretionary requirement for the notice of the demand to be given by a bank officer - it is therefore proper and valid for the solicitor acting on behalf of the bank to sign and send the notice of the demand to the appellant as the solicitor is the agent of the bank; therefore the service of the notice as the solicitor acting for the respondent is a valid notice;
- (b) based on the case law, Clause 1 of the guarantee and the letter of offer from SBB dated 6 January 1982, the guarantee was valid and the interest which was fixed at 16% per annum was accepted by the appellant without protest or objections when the statements of accounts were sent to them from time to time.
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- [3] (a) Although the issue of whether the execution of the second guarantee discharges L from his liability in the first guarantee was pleaded as a defence, no evidence was adduced in the Court below to prove that the execution of the second guarantee was intended or had the effect of a substitution for the first guarantee and that it resulted in discharging all the directors of the company as guarantors under the earlier guarantee;
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- (b) it was the intention of the respondent that the first and the second guarantee should subsist side by side and not one in substitution for another - neither can such an intention be implied from the giving of the second guarantee; the guarantors for the first guarantee and the guarantors for the second guarantee cannot be said to be 'identical' so as to imply that the second guarantee is in fact given in substitution for and to discharge the former;
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- (c) the amount guaranteed under the first guarantee was also different from that in the second guarantee where the terms of repayment of the term loans themselves are different; the second guarantee could only take effect if the monies under the term loans were released but the evidence shows that no monies had been released thereunder.
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[4] On the proper construction of Clause 5(iii), the liability of the appellant under the first guarantee for the sum of RM700,000 which comes within the scope of the words "any money hereby guaranteed" is clearly preserved.

- i* [Appeal dismissed.]

Cases referred to:

Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. 1 QB 84
Associated Pan Malaysia Cement Sdn. Bhd. v. Syarikat Teknikal & Kejuruteraan Sdn. Bhd. [1990] 3 MLJ 287

Canadian Petrofina Ltd. v. Motormart Ltd. [1970] 7 DLR (3rd) 330

Central Provident Fund Board v. Ho Bock Kee [1981] 2 MLJ 162

Chartered Bank v. Yong Chan [1974] 1 MLJ 157

Chung Khiaw Bank Limited v. Hotel Rasa Sayang Sdn. Bhd. & Anor. [1990] 1 MLJ 156

Esso Petroleum Company Ltd. v. Southport Corporation [1956] AC 218

Farrell v. Secretary of State [1980] 1 All ER 166

Hadmor Productions v. Hamilton [1983] 1 AC 191

Janagi v. Ong Boon Kiat [1971] 2 MLJ 196

Mahoney v. McManus [1981] 55 ALJR 673

Mobil Oil Australia Ltd. v. Costa [1969] 14 FLR 343

Muniandy & Anor. v. Muhamad Abdul Kader & Ors. [1989] 2 MLJ 416

Mutiah Chettiar v. Periyar Kone [1920] AIR Madras 115

Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd. [1989] 1 MLJ 155

Overseas-Chinese Banking Corporation Ltd. v. Philip Wee Kee Phuan [1984] 2 MLJ 1

Other source referred to:

Halsbury's Laws of England 4th Edn., para. 702 p. 419 Vol. 1

For the appellant - Sri Ram; M/s. Raj Selva & Co.

For the respondent - Lim Seng Choon; M/s. Lim Seong Chun & Co.

JUDGMENT**Mohd. Jemuri Serjan SCJ:**

By a letter dated 6 January 1982 the respondent, Southern Bank Berhad, (the bank) granted an overdraft facility of RM700,000 to Sin Hup Woh Transport and Trading Agencies Company Bhd. (the company). The overdraft facility was serviced by a charge over 8 parcels of properties and guaranteed jointly and severally by the board of directors of the company of whom the appellant was a member. The guarantee which was executed on 6 January 1982 was a continuing guarantee to the limit of RM700,000. By a letter dated 13 January 1984 the respondent's then solicitor demanded payment of a sum of RM506,242.35 being the sum in excess of the overdraft from the company. As no payment was forthcoming the respondent commenced proceedings by a writ of summons dated 1 September 1984 against all the guarantors. According to the amended statement of claim the amount claimed by the respondent was for a sum of RM1,311,792.85 together with interest thereon at 16% per annum from 17 July 1984 to the date of satisfaction. The liability on the guarantors including the appellant arose out of the guarantee dated 6 January 1982 and another guarantee dated 19 September 1983 which was executed only by four directors of the company, excluding the appellant and two other directors. The second guarantee was also a continuing guarantee and to cover the overdraft as well as two term loans which had been approved but not released. The guarantors' liability under the second guarantee was up to the limit of RM900,000 in respect of credit facilities, made up of apparently the approved term loans of RM200,000 and RM90,000 and the overdraft of RM700,000.

In the appeal before us learned Counsel for the appellant submitted that there were only three issues for our determination:

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- (i) Whether a proper demand was made on the appellant;
 - (ii) Whether the appellant was released from his liability under the first guarantee by reasons of the respondent having obtained the second guarantee from the directors; and
 - (iii) Whether the failure to specify the rate of interest by leaving it blank in the first guarantee renders the first guarantee void for uncertainty.
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- On the first issue it was contended for the appellant that the notice was given by Mogan & Co., the then solicitor for the respondent, and not by one of its officers as provided under Clause 11 of the first guarantee which prescribed the mode in which the notice or demand were to be made. Since there was non-compliance with the prescribed mode the notice of demand was therefore nugatory. In this connection *Central Provident Fund Board v. Ho Bock Kee* [1981] 2 MLJ 162 and *Mobil Oil Australia Ltd. v. Costa* [1969] 14 FLR 343 were
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- quoted as authorities. It was further contended that the demand made was for payment of the sum of RM506,242.35 which was in excess of the overdraft limit of RM700,000 for which sum the appellant was only liable under the first guarantee.
- With regard to the second issue the contention was that since there was a change in the constitution of the board of directors in 1983, and the resignation of the appellant on
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- 30 March 1983, and the second guarantee was executed only by the newly constituted board of directors but without the appellant, the respondent intended to exclude the appellant as a guarantor. The respondent consequently was estopped from relying on the first guarantee. Furthermore, since no separate overdraft facilities were granted for RM990,000 as claimed in the amended statement of claim, the sum of RM700,000 in the first guarantee therefore merged into the second guarantee. Thus, the appellant was discharged from his liability because of
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- the substitution of the second guarantee for the first guarantee.
- The submission by learned Counsel for the appellant on the third issue centered on the uncertainty of the rate of interest. Because the rate of interest which was an essential element of the guarantee was omitted from the guarantee, the guarantee was void. *Mutiah Chettiar v. Periyas Kone* AIR [1920] Madras 115 was quoted as authority. Counsel admitted that this
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- issue was not pleaded in the defence but cross-examination on it did take place and no objection was taken. *Overseas-Chinese Banking Corporation Ltd. v. Philip Wee Kee Phuan* [1984] 2 MLJ 1 was the authority for this proposition.
- Before we deal with the contentions of the appellant on these issues, it is pertinent to advert to the defence raised by the appellant in his amended statement of defence, his evidence at the trial and the finding of the trial Judge in the Court below. Significantly it was observed
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- that based on the evidence and the amended statement of claim the whole fabric of the defence was ostensibly the total denial by the appellant of his involvement with the affairs of the company, of the knowledge of any overdraft facility provided by the respondent, of any debt to the respondent and the execution by him of both the first and the second guarantee and that the respondent never required him to execute the guarantee. It would appear as if we were made to believe that he was a nominal director only. However he also averred that,
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- assuming if he executed the first guarantee by taking the second guarantee for the sum of RM900,000 executed on 19 September 1983 the respondent by the conduct of its officers, servants or agents had waived any claim against the appellant in respect of the earlier guarantee allegedly executed by him. Any liability if any, on his part arising from the earlier guarantee in any case had been discharged by the substitution of the second guarantee.
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In his judgment the learned Judge held that the blanks in the first guarantee in respect of the rate of interest did not invalidate that guarantee because the rate of interest had been stated in the offer letter and none of the guarantors including the appellant ever raised objections or queried the interest when the monthly statements of accounts were sent to them. However, the learned Judge did not deal with the defendant's averments that the substitution of the second guarantee which was signed by only four directors discharged him from his liability in the first guarantee. The learned Judge did not understandably enough offer any view on this issue, apparently probably because no extrinsic evidence was adduced by the defendant to prove the substitution of the second for the first guarantee nor any specific and convincing submission on it except for the suggestion that no explanation was offered for the second guarantee which included the RM700,000 overdraft and that the first guarantee was defective in some way. How or why it was defective was left to speculation. Instead, it was held by the Judge that it was of no consequence that the second guarantee was entered into as the action before him was not in respect of the first guarantee but of the second guarantee. As for the submission that the second guarantee was entered into because of the defects in the first guarantee the learned Judge held that the second guarantee was not necessary because no further sums of money was released under the second guarantee.

It was manifestly clear in our view that the learned Judge must have indubitably held that the first guarantee was valid and binding on all of the seven guarantors despite the execution of the second guarantee by the new board of directors. Although the amended statement of defence did not plead either proper service of the notice on the appellant or that the notice did not comply strictly with the terms of Clause 11 of the guarantee the defence Counsel nevertheless in his submission raised the issue of the defective nature of the notice on account of the demand for excess overdraft therein and because it was not signed by a bank officer but was signed and sent by the then solicitor for the respondent. Counsel for the appellant also questioned the propriety of the service of the notice on the appellant. Relying upon the evidence before him the learned Judge found that the first guarantee was signed by the appellant, the service of the notice was properly made, the demand was made in compliance with the ruling in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank* [1989] 3 MLJ 155 and that the amount due in the notice was correct. Again, probably because this issue was not pleaded, the learned Judge made no ruling on the question of the form of the notice.

It was demonstrably obvious from the record of appeal that the first and the third issues which learned Counsel for the appellant canvassed before us were never pleaded at all. A careful scrutiny of the evidence of the appellant himself at the trial shows that evidence was never led and adduced in respect of these two issues. It is all the more perplexing that if these two issues were regarded as vital and decisive for the case of the appellant in the Court below they were conspicuously omitted from the pleadings although Counsel for the appellant at the trial made some feeble attempts to raise the issues during cross-examination of the first witness for the plaintiff, Saw Siew Thaik, and in his submission at the close of the case for the appellant. No attempts were made to have the amended statement of defence further amended either. The appellant's evidence primarily centered upon the various denials he averred in his amended statement of defence, his denial of the execution of the first guarantee, in particular. It takes Mr. Sri Ram, Counsel for the appellant, at the hearing of this appeal to valiantly, in his usual eloquence, canvass these issues which we thought as rather late in the day to pursue though he had to concede boldly that the appellant did in fact

a execute the first guarantee, thus making a surprisingly right-about turn in the stand taken by the appellant, considering his robust and unrelenting denials during the trial. In his reply to Dato' Lim's submission Mr. Sri Ram said that the issues were argued at the trial. This raises the question whether such vital issues affecting the result of the appellant's case need not be pleaded at the outset but could decisively be determined after cross-examinations of witnesses for the plaintiff and submission by Counsel for the defendant at the trial.

b Saw Siew Thaik was cross-examined on the demand in excess of the overdraft and on the service but not on the form of the demand and absence of the rate of interest in the first guarantee. Mr. A.I. Raj, Counsel for the defendant at the trial, however, in his submission raised the question of the validity of the service of the notice of demand, the demand itself, because it was in excess of the limit of the defendant's liability under the guarantee, and the mode of service of the notice which was signed and sent by the solicitor for the plaintiff

c instead of a bank officer as stipulated in the guarantee.

It does not seem necessary for us to emphasise and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our Courts. It is only a question of whether Counsels, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no heed at all and we must say that they do so at their peril. Recently lapses in the strict compliance with the rules of pleadings occurred in our Courts with marked frequency and we do not see how such lapses in the Courts should be tolerated at the expense of the clients.

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Perhaps it would be sufficient and pertinent to repeat here in the hope that we have said the last words on this issue, what Raja Azlan Shah (FJ as he then was) said in the *Chartered Bank v. Yong Chan* [1974] 1 MLJ 157 at 159 where he said:

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In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.

and what Sharma J, said in *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196 at 197:

f A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the Courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the constitution and the Government

g depends to a fairly large extent on the way the machinery of justice functions and it is the duty of the those who man that machinery to realise that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned Magistrate had acted in less haste and had taken a little time to look up the law on the matter.

The observations of Lord Edmund-Davies in the case of *Farrell v. Secretary of State* [1980] 1 AER 166 at 173 are equally pertinent:

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It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to pay an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments,

i circumstances may arise when the grant of permission would work injustice or, at least,

necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

Lastly on the same topic we would adopt the observations of Lord Radcliffe in *Esso Petroleum Company Ltd. v. Southport Corporation* [1956] AC 218 at 241 where he said:

It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate Court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system.

We need only to refer to three recent cases where this Court had to deal with similar issues to illustrate occurrences of lapses on the part of solicitors in the preparation of their pleadings with the resultant dire consequences. We refer to the recent appeal in this Court which had occasion to decide the issue whether to allow a new point raised on appeal but not pleaded and argued in the High Court. In that case the Court was unanimous in its decision to refuse to allow the new point to be argued without calling for fresh evidence. Mohd. Azmi SCJ in delivering the judgment of the Court in the case of *Muniandy & Anor. v. Muhamad Abdul Kader & Ors.* [1989] 2 MLJ 416 said at p. 418:

Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v. Hamilton* [1983] 1 AC 191 (refd) at p. 233:

Under our adversary system of procedure, for a Judge to disregard the rule by which Counsels are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the Judge, and to be given the opportunity of stating what his answer to it is.

Again on the same page the learned Judge continued:

In our view these authorities do not appear to support the appellants' application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorised as falling within the realm of technicality. The so-called 'omission' is in fact a new line of defence altogether. The new defence based on equitable estoppel was never pleaded or argued in the Courts below. The stand taken by the appellant throughout was that they were not trespassers because they were paying ground rents to Arumugam Pillai since 1963, and due to the said ground tenancy, they claimed, albeit mistakenly, protection against eviction under the rent control legislation.

In yet another very recent case the same issue fell to be determined by this Court. Hashim Yeop A. Sani CJ (Malaya) in delivering the judgment of this Court quoted *Muniandy's* case and Mohd. Azmi's observations quoted above. At p. 363 of the judgment the learned CJ said:

The crucial issue of the application of doctrine of severance should have been pleaded and argued before the learned Judge and it would be wrong in our view to allow the alternative ground of appeal to be argued at this late stage.

a See the case of *Chung Khiaw Bank Limited v. Hotel Rasa Sayang Sdn. Bhd. & Anor.* [1990] 1 MLJ 156. One of the grounds of the dismissal of the appeal by the bank was that the doctrine of severance was not pleaded and argued in the Court of first instance. The most recent case where the same subject was discussed is *Associated Pan Malaysia Cement Sdn. Bhd. v. Syarikat Teknikal & Kejuruteraan Sdn. Bhd.* [1990] 3 MLJ 287. Gunn Chit Tuan SCJ at p. 296 has this to say:

b As regards the tax element it is impossible to assess the reduction to be made for taxation without any or sufficient evidence. Had there been a deduction for tax the amount awarded would of course be less, and following *Daishowa's* case the amount of damages awarded would have been reduced further. However, as pointed out by Mr. Murthi, the question of deduction of income tax was not raised at all before the trial Judge and there is no evidence adduced by either party as to the liability of the respondent to pay tax or the amount of its tax liability.

c In the circumstances of this case we would therefore decline to make any further deductions for tax.

All these three cases deal with similar point i.e., that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal.

d In the light of our observations above and on the authorities we do not propose to lend countenance to Mr. Sri Ram's submission on these issues and would dismiss this appeal in respect of these issues.

Even if we have not ruled against the appellant for non-compliance with the rules on pleadings, the grounds of appeal based on the first and third issues would, nevertheless, still fail for the following reasons. The only point raised on the first issue worth considering is whether there was any demand at all within the terms of Clause 11 of the first guarantee as the notice of demand was signed and sent by the then solicitor for the respondent and not by one of its officers. Dato' Lim submitted that the demand was properly made since there was evidence that the solicitor was authorised by the respondent to act on its behalf and as such the solicitor acted as agent for the bank. See para. 702 at p. 419 of Vol. 1 of *Halsbury's Laws of England* 4th Edn. In any event we also noted that Clause 11 of the first guarantee admits of flexibility in the mode of making the demand in that it is not a mandatory but a discretionary requirement for the notice of the demand to be effectually given by a bank officer. In view of the discretionary nature of the requirement under Clause 11 it is therefore proper and valid for the solicitor to act on behalf of the bank by signing and sending the notice of the demand to the appellant. Clause 11 reads as follows:

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g 11. Any notice or demand in relation to the matters aforesaid **may be effectually given** or made to me/us by any officer of the bank or by notice in writing under the hand of any such officer either served personally on me/us or left for or sent by post to me/us at my/our usual or last known place of business in. (Our emphasis).

The authorities cited by the appellant on this point in our view did not avail the appellant because they can be distinguished on the facts. For instance in the case of *Canadian Petrofina Ltd. v. Motormart Ltd.* [1970] 7 DLR (3rd) 330 neither in the pleadings nor in the evidence was there an indication that any demand was ever made upon the guarantors to honor their undertaking as such. All communications which the guarantors received were sent to them as officials and representatives of the principal debtor Motormart Ltd. Since the giving of the notice or demand had not been given to the guarantors as guarantors it was decided that there was no proper demand and their liability did not arise under the giving of such notice and demand on the guarantors. Similarly in *Mobil Oil Australia Ltd. v. Costs* (*supra*) the option was to be exercised by notice posted by registered mail. It was decided

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in that case that the notice by ordinary mail was not a compliance with the requirements of the agreement for notice by registered mail and that the notice sent by registered mail, having been made after the commencement of the proceedings, was immaterial to those proceedings. In *Central Provident Fund Board v. Ho Bock Kee* (*supra*) one of the questions raised in the Court of Appeal of Singapore was whether the notice sent otherwise than in compliance with the agreement was invalid on account of there being no valid notice of default. It was provided in the agreement that notice of default should be sent by registered post and that there was no alternative mode of service provided in the agreement. It was held that since the notice was delivered by hand there was no valid notice. *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v. Kwong Yik Bank Bhd.* (*supra*) deals with the invalidity of a demand under a guarantee when copies of the demand and not the originals were sent to the guarantors and so is not quite in point.

In the present case as clearly provided by Clause 11 of the first guarantee the mode of serving the notice can either be made by an officer of the bank or by the solicitor as agent of the bank and therefore the service of the notice by the solicitor acting for the respondent is a valid notice.

The third issue can also be briefly disposed of. Mr. Sri Ram argued that the guarantee was invalid for uncertainty in the rate of interest because of the omission of the rate of interest in Clause 4 of the guarantee. We regret we are unable to accept this contention as on authority it is well established that the guarantee, Clause 1 thereof in particular, must be considered together with the letter of offer from the bank dated 6 January 1982. Clause 1 of the guarantee reads:

1. I/We will pay to you on demand (subject to the limit hereinafter specified) all moneys which now are or may, during the continuance of this agreement, be owing to you from the customer(s) (whether alone or jointly with another or others) or remain unpaid on the general balance of his/their account with you including all advances, overdrafts, and discounts made or allowed by you and all bills, notes, or other instruments held by you, on or in respect of which he/they or either/any of them may be, or have been liable to you, all charges for commission and other ordinary banking expenses, **interest at your usual rate or rates**, for the time being in relation to such accounts with rests as ordinarily calculated by you, although the relationship of banker and customer may have ceased, and all costs, charges, and expenses which you may incur in enforcing, or seeking to obtain payment of all or any part of the money hereby guaranteed, or in respect of which indemnity is given. (Emphasis added).

The third condition of the approval of the application for the overdraft of RM700,000 to be covered by the first guarantee is in the following terms:

The interest rate/s for the O/D facility shall be at 16% per annum at monthly rest (or at any rate/s the bank may at its absolute discretion prescribe from time to time.)

In this respect the observations of Lord Denning MR at pp. 118-119 in the *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* 1 QB 84 are instructive and appropriately applicable to the facts of the instant case:

I take a different view from the Judge. He has construed the guarantee in its strict literal sense - all by itself - without regard to the letters which accompanied - it and without regard to the surrounding circumstances - or the "factual matrix" to use the modern equivalent.

The guarantee on 28 September 1970, was of no effect by itself. It only took effect on 31 December 1970, when the sum of \$3,250,000 was advanced. That sum of \$3,250,000 is the connecting link which joins everything together. It was the "facility" which the bank promised on 23 September 1970, to make available to A.N.P.P and which was to be supported

- a* by a mortgage on the Harrison Building; and by a guarantee from the plaintiffs to the bank. It was the “banking facilities” contained in the guarantee itself. It was the “facility” which was in fact granted on 31 December 1970, and supported by a mortgage. The words of the printed form must, in my opinion, be subordinated to the express provisions of the correspondence which brought it into being. That correspondence shows, beyond doubt, that the guarantee was intended to cover the US\$3,250,000 lent by the bank to A.N.P.P., even though it was done through the channel of its wholly-owned subsidiary, Portsoken.
- b* We therefore agree with the learned Judge’s finding that the guarantee was valid and that the interest was fixed at 16% per annum which was accepted by the appellant without protest or objections when the statements of accounts were sent to them from time to time. The ground of appeal on the third issue would also fail. However, it must be clearly noted that in terms of the first guarantee the appellant’s liability is limited to only RM700,000 and we
- c* so rule in this appeal.
- On the second issue the crucial question basically is whether the execution of the second guarantee dated 19 September 1983 by the four directors of the company expressly or by implication discharges the appellant from his liability in the first guarantee. Although the issue was pleaded as a defence no evidence was adduced in the Court below to prove that
- d* the execution of the second guarantee was intended or had the effect of a substitution for the first guarantee, thereby discharging all the directors of the company as guarantors under the earlier guarantee. It was contended for the appellant before us that because of the change of the constitution of the board of directors of the company which gave the second guarantee without the appellant and the merger of the overdraft of RM700,000 in the first guarantee into the second guarantee there was an indication to exclude the appellant as a guarantor and that the respondent was estopped from relying on the first guarantee. We were in fact
- e* invited to infer from this evidence that the second guarantee was in substitution for the first guarantee which also discharges the appellant from his obligation under the first guarantee. No authority was cited for this proposition for according to Counsel there is none on this point.
- In the Court below evidence was adduced to show that the bank approved to grant the
- f* company two term loan facilities, one for the sum of RM200,000 and the other for the sum of RM90,000 with interest at 16% in respect of the first term loan and 15.5% of the other. However, none of the monies under the term loans was released. Besides, the terms of repayment of the loans were different from the overdraft. Saw Siew Thaik however, could not explain why it was necessary to execute two separate guarantees, one for the two term loans together with the overdraft of RM700,000 which was already covered by the first
- g* guarantee and two, the guarantee for the RM700,000 (i.e., the first guarantee). This witness was emphatic in her evidence that the suit was instituted based on the first guarantee and the bank was not concerned with the second guarantee under which no monies had been released yet. She was equally adamant that the bank did not discharge any of the guarantors in the first guarantee when the second guarantee was entered into by the four directors of the company. Dato’ Lim for the respondent in his submission drew our attention to
- h* Clause 5(iii) of the first guarantee which he claimed provided the answer to the question raised in the second issue. Clause 5(iii) of the first guarantee reads:
- This guarantee and/or indemnity shall not be prejudiced, diminished or affected nor shall I (we or any/either of us) be released or exonerated by any of the matters following:
- (iii) Any other guarantee, indemnity, security negotiable or otherwise which you may now or at any time hereafter hold from the customer(s) or from me/us or any other
- i* person in respect of any moneys hereby guaranteed.

We agree with this submission and in our view on the proper construction of Clause 5(iii) the liability of the appellant under the first guarantee for the sum of RM700,000 which comes within the scope of the words “any moneys hereby guaranteed” is clearly preserved. On this ground alone we would dismiss the appeal on the second issue.

Be that as it may, it would not be out of place to determine this issue in the light of the appellant’s contention. The case of *Mahoney v. McManus* [1981] 55 ALJR 673 provides the closest analogy to the present case and we think it is relevant for the determination of this issue. The facts of this case can be briefly summarised:

(1) A guarantee dated 14 August 1973 by which the appellant, the respondent and Mundt jointly and severally guaranteed the due payment to Chrysler Marine Australia Pty. Ltd. (Chrysler) of all moneys which were then owing or which should thereafter become due and owing to Chrysler by the company pursuant to an authorized dealer sales agreement, made between Chrysler and the company, to which the guarantee was annexed.

In about February 1974 the respondent, who wished to withdraw from the business, resigned as a director and sold his shares to Ambrose Malone. Thereafter, on 15 May 1974, Chrysler and the company entered into a new authorised dealer sales agreement which, by Clause 16, provided as follows:

‘It is acknowledged by Chrysler and the dealer (the company) that this agreement forms the entire agreement between the parties and that it cancels and supersedes all prior agreements of any nature whatsoever and further that this agreement shall operate as a mutual release by and between the parties in respect of any rights that may have existed under any prior agreement excepting only the obligations of either party to pay to the other any existing indebtedness.’

Annexed to that agreement was a guarantee dated 16 May 1974 executed by the appellant, Mundt and Malone who agreed that they were jointly and severally liable for the present and future indebtedness of “the New General Marine Pty. Ltd.” to Chrysler.

On 31 May 1974 letters were sent by Chrysler to the appellant and to Mundt. With each letter was enclosed an invoice showing that the amount due by the company as at 30 April 1974, “collectable under personal guarantee”, was RM75,167.15. The letters (which were in identical terms) stated that Chrysler’s alternatives were either to take legal action which would ultimately lead to the company being placed in liquidation or receivership or to exercise Chrysler’s right of recourse under the personal guarantees, and that, since Chrysler did not wish to see the company forced into liquidation, it wished “to exercise the personal guarantees”. The letters concluded with the following statement:

Unless we are informed by next Monday morning of alternative financing arrangements we will then proceed to exercise our options under the personal guarantees and will therefore pursue by action against each guarantor, the settlement of the full amount outstanding.

The letters did not specifically mention the guarantees to which they referred, but the amount claimed was due as at 30 April 1974, before the second guarantee was executed, and was “existing indebtedness” within the meaning of Clause 16 of the agreement to which the second guarantee was annexed. On 11 June a further letter was sent to the appellant (and presumably also to Mundt) on behalf of Chrysler; this letter referred to the guarantee executed on 16 May 1974 and demanded payment of the outstanding balance of RM75,167.15 on or before 20 June, and threatened proceedings under the guarantee if the amount was not paid.

Gibbs CJ, at p. 676 in dealing with the question whether the guarantee dated 16 May 1974 by Mahoney, Mundt and Malone as guarantors should be taken in substitution for and in discharge of the former guarantee dated 14 August 1973 has this to say:

- a* The guarantee of 16 May 1974 is expressed to be in respect of present as well as of future indebtedness. The parties to it guaranteed payment of the indebtedness which was the subject of the earlier guarantee, and of other indebtedness as well. If all the parties to both guarantees had been the same, it might have been easy to reach the conclusion that they intended, not that there should be two identical guarantees in respect of the same existing indebtedness, but that the latter guarantee was to be taken in substitution for, and to discharge, the former. But
- b* the position is different when the parties to the two guarantees are not the same. It is not inconsistent with the continued operation of a joint and several guarantee by A, B and C, that a joint and several should be taken from A, B and D in respect of the same indebtedness. There is no reason why the two guarantees should not both be effective, so that the creditor can avail himself of either or both, and so that any surety can obtain contribution against all the others. There was no expressed intention to discharge the appellant and Mundt from their joint and several liability under the guarantee of August 1973, and I can see no good reason
- c* for implying any such intention; on the contrary, there is every reason to assume that Chrysler would not have intended to discharge the appellant or Mundt, if the effect of so doing would have been to release the respondent from his liability. It is not unreasonable to assume that Chrysler wished to have the benefit of both guarantees. It was not in my opinion established that the guarantee of 16 May 1974 was accepted in substitution for that of 14 August 1973 or that it had the effect of discharging the appellant from his obligations under the earlier guarantee.
- d* It would seem from the dictum, Gibbs CJ contemplated a situation in which the second guarantee was identical with the first when he said:
- If all the parties to both guarantees had been the same, it would have been easy to reach the conclusion that they intended, not that there should be two identical guarantees in respect of the same existing indebtedness, but that the latter guarantee was to be taken in substitution
- e* for, and to discharge, the former.
- Such a situation does not obtain in the present case. The guarantors for the first guarantee and the guarantors for the second guarantee cannot be said in the strict sense of the word ‘identical’ to enable us to decide by implication that the second guarantee is in fact given in substitution for, and to discharge, the former. The amount guaranteed under the first guarantee was also different from that in the second guarantee where the terms of repayment of the
- f* term loans themselves are different. Besides, the second guarantee could only take effect if the monies under the term loans were released but the evidence shows that no monies had been released thereunder. More importantly, there is no evidence for us to hold that it was intended by the appellant that the first be replaced by the second guarantee and that the guarantor be discharged. On the contrary, we are satisfied on evidence that it was the intention of the respondent that the first and the second guarantee should subsist side by side and
- g* not one in substitution for another, with all apparent consequences following. Neither can we imply from the giving of the second guarantee *per se* such intention. On the other hand we are of the view that the rest of Gibbs CJ’s dictum in the passage, quoted above is applicable to the facts obtaining in the present case.
- In the result on these grounds the appeal should also be dismissed with costs. The deposit
- h* to the respondent on account of taxed costs.

Also found at [1991] 1 CLJ 667